FROM THE WORKERS' COMP. SECTION

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WHERE DOES THE BUCK STOP?

COMPARATIVE NEGLIGENCE, THE RESPONSIBILITY OF GENERAL CONTRACTORS, AND THE INEVITABLE LEGISLATIVE ATTACK

It is imperative that those of us who represent injured workers keep our eye on the status of Section 50-71-101, MCA, Montana's Safety Act. The purpose of this article is to two-fold. First, I am providing notice of recent Montana District Court decisions which apply Montana's Safety Act, Section 50-71-101, MCA. Second, I want to put the membership of the MTLA on notice as to the distinct possibility of a legislative attack on Montana's Safety Act. In this effort, I will review the basics of the employer's non-delegable duty, consider the statute's historical context, and discuss four recent Montana District Court decisions. The text of the district court opinions are available through the MTLA office.

The Basics of the Duty of the General Contractor

Determining whether a general contractor, developer, or landowner has a duty to a subcontractor's employee begins with the general rule that there is no duty absent some form of control. *Shannon v. Howard S. Wright Const. Co.*, 181 Mont. 269, 593 P.2d 438 (1979); *West v. Morrison-Knudsen Co.*, 451 F.2d 493, 495 (9th Cir. 1971); and *Wells v. Stanley J. Thill & Assoc., Inc.*, 153 Mont. 28, 452 P.2d 1015 (1969) (emphasis added). However, as the court in *Shannon* explained, "there are so many exceptions to the general rule of non-liability that the rule is applied only when there is no good reason found not to apply it. *Shannon*, 593 P.2d at 442. Indeed, the general rule has been described as "primarily important as a preamble to the catalog of its exceptions." *Shannon* Id. (Quoting *Pacific Fire Insurance Co. v. Kenny Boiler & Manufacturing Co.* 201 Minn. 500, 277 N.W. 226, 228 (1937). Whether the general contractor or landowner retained control is the focus of determining the existence of a duty.

Three Methods of Control

An exception to the general rule that general contractors and landowners have no duty is established one of three ways: 1) through contract; 2) through the actions of the general contractor or landowner; or 3) anytime "inherently dangerous work" has been contracted by the general contractor or landowner.

1) Control by Contract

A general contractor or landowner may retain control over safety on a job site by specifically setting out these duties in contract. This obligation may be spelled out by an agreement 1) between the subcontractor and the general contractor; 2) between the general contractor and the landowner; or 3) between the subcontractor and the landowner. Finally, contracts to provide liability insurance between or among owner, general contractor, and subcontractors are also be critically important in evaluating which entity will ultimately be held responsible for a judgment once a judgment is obtained.

In the Montana Supreme Court's 1995 decision in *Gibby v. Noranda Minerals Corporation*, 273 Mont. 420, 905 P.2d 126, the court reviewed the language of a contract (the Purchase Order Agreement) between the plaintiff's employer and the defendant. *Gibby*, 905 P.2d at 129. The Purchase Order Agreement was very specific in allowing Noranda control over a multitude of aspects of the job and specifically allowed Noranda control over safety issues. *Gibby*, 905 P.2d at 129. The court in *Gibby* explained that when such a contractual obligation exists, the provisions of Section 50-71-201, MCA, apply. Further, the court held that Section 50-71-201, MCA, was applicable to defendant despite the fact that Noranda held itself out to be an owner and not an "employer." *Gibby*, 905 P.2d at 130. Once control of safety is established through contract, jurors need look no further than the actions (or lack of actions) of the defendant (the party who retained control by contract) to determine whether the defendant's obligations set out in Section 50-71-201, MCA, have been satisfied. *Gibby*, 905 P.2d at 428. Comparative negligence on the part of the plaintiff may not be considered.

2) Actual Control: The Means to Control Safety Matters

Even when there is no specific clause in a contract between the employee's direct employer and the general contractor that obligates the contractor or property owner to initiate, maintain, or supervise safety, a general contractor or landowner may still have a duty. See *Steiner v. Department of Highways* 269 Mont. 270, 276, 887 P.2d 1228, 1232 (1994).

In *Steiner*, the injured worker was employed by Frontier West, Inc., a contractor doing bridge construction on a project between Libby and

Kalispell, Montana. Mr. Steiner severely injured his back when he fell from a scaffold structure that was attached to the outside of the bridge being constructed. *Steiner*, 887 P.2d at 1229-30.

In *Steiner*, the Montana Department of Highways (MDOH) and the Federal Highway Administration (FHWA), entered into a contract that required MDOH to inspect the scaffolding structure and the work surface used by all employees. *Steiner*, 887 P.2d at 1233. The Montana Supreme Court, in *Steiner*, held that, despite the fact that the MDOH did not have a direct contract with the plaintiff's employer, the contractual duty established between MDOH and FHWA created a contractual duty that invoked the application of the Scaffolding Act. *Steiner*, 887 P.2d at 1233. As discussed below, it is the Montana Supreme Court's decision in *Steiner* that ultimately led to the amendment of Section 50-77-101, MCA, Montana's Scaffolding Act.

3) Inherently Dangerous Work

As the Federal District Court in *McMillan v. United States*, 112 F.3d 1040 (D. Mont. 1997), explained, Montana has adopted Sections 416 and 427 of the Restatement (Second) of Torts, which provides for the "inherently dangerous exception" to the general rule that a general contractor is not responsible for injuries sustained by employees of a subcontractor. *McMillan*, 112 F.3d at 1043. The application of Sections 416 and 417 of the Restatement (Second) of Torts was set out in *Micheletto v. State of Montana*, 244 Mont. 483, 798 P.2d 989 (1990). Although the *Micheletto* decision was overruled (on other grounds) in *Beckman v. Butte-Silver Bow County*, 299 Mont. 389, 1 P.3d 348 (Mont. 2000), Montana continues to recognize Sections 416 and 417 of the Restatement (Second) of Torts as an exception to the general rule that general contractors are not responsible for the safety of employees. *Beckman v. Butte-Silver Bow County* overruled the Montana Supreme Court's decision in *Micheletto*, where the court explained that trenching operations were not "inherently dangerous." As the federal court in *McMillan* explained, "A general contractor must have reasonably contemplated the danger at the time the contract between the general contractor and the plaintiff's employer was executed and cannot shift the responsibility for such dangers or for taking precautions against them to the subcontractor." *McMillan*, 112 F.3d at 1043 (citing Restatement (Second) of Torts § 416 cmt. a (1965); Restatement (Second) of Torts § 427 cmt. d (1965)).

Although the determination as to whether work is considered "inherently dangerous" is fact-specific, the Montana Supreme Court's analysis in *Beckman v. Butte-Silver Bow County*, 299 Mont., 389, 1 P.3d 348, provides an explanation of what constitutes "ordinary or standard" precautions. As the court explained in *Beckman*, "Employers are not liable for every tort committed by a subcontractor who is engaged in an inherently dangerous or hazardous activity. Rather, an employer is only vicariously liable for those torts which arise from the unreasonable risks caused by engaging in that activity." *Beckman*, 1 P.3d 397-98 (citing Restatement (Second) of Torts § 416 cmt. d.).

The trenching operations discussed in *Beckman v. Butte-Silver Bow County* are just one type of "inherently dangerous" activity that creates

a duty on the part of the general contractor and landowner. Additional construction activities that create such a duty are more specifically outlined in Restatement (Second) of Torts, §§ 416 and 417.

History of the Non-Delegable Duty to Provide a Safe Place to Work

In a state with Montana's labor history, it is little surprise that the issue of the duty to provide a safe place to work was discussed during the 1972 Constitutional Convention. MTLA member Wade Dahood was instrumental in addressing this issue at the Constitutional Convention. In debating the full legal redress requirement of Article II, Section 16, the transcript reflects as follows:

> "We allowed in our Bill of Rights an Amendment to a clean and healthy environment. By this provision and this amendment we are going to provide for the working man a safe environment. How does the law stand at the moment? Let me tell you how it stands. And some of the big vested corporate interests are now using independent contractors because it's reduced their cost of operation. If you have some particular tough job that you want done on your premises where there may be some danger connected with it, what do you do? You go out and hire an independent contractor. Don't have your employees in that dangerous area because if they're hurt or there's an accident, you'll have to pay them Worker's Compensation. So here's the way you do it now that we have immunity from the Supreme Court — an immunity neither intended by the people nor intended by the legislature. What you do, you hire someone on an independent contractor basis and their employees are in this dangerous area. You don't have to worry about safety anymore. You don't have to do anything to make your premises safe. You don't have to be concerned about a safe environment for the people who are working there to benefit your interest." (Quoting transcript of Montana Constitutional Convention, volume 7, part 2, at 5417).[1]

In addition to the Constitutional protections set out under Article II, Section 16, the statutory protection of workers is set out in Section 50-71-201, which states:

> "Section 50-71-201. Employer To Provide Safe Place and to Purchase, Furnish, and Require Use of Health and Safety Items – Safe Practices. Each employer shall:
> "(1) Furnish a place of employment that is safe for each of his employees;
> "(2) With the exception of footwear, purchase, furnish, and require the use of health and safety devices, safeguards, protective safety clothing, or other health and safety items, including but not limited to air

masks, hardhats, and protective gloves, that may be required by state or federal law, the employer, or the terms of an employment contract, unless the terms of a collective bargaining agreement provide otherwise;
"(3) Adopt and use practices, means, methods, operations, and processes that are reasonably adequate to render the place of employment safe; and
"(4) Do any other thing reasonably necessary to protect life, health, and safety of his employees."

The obligation toward landowners and developers is set out in Section 50-71-202, which states as follows:

"Employer to provide and maintain safe place of employment:
"(1) An employer who is the owner or lessee of any real property in this state shall not construct or cause to be constructed or maintain any place of employment that is unsafe.
"(2) Every employer who is the owner of a place of employment or the lessee thereof of shall repair and maintain the same as to render it safe."

The combination of the previously described statutes and Article II, Section 16 of the Montana State Constitution provide the basis for the protection workers currently enjoy. Unfortunately, as evidenced by the 1995 Amendment to the Scaffolding Act, these protections are not etched in stone and could be changed at the whim of the Montana State Legislature.

The Destruction of the Montana Scaffolding Act and Lessons Learned

Prior to the 1995 Legislature's destruction of the Scaffolding Act, the Montana Supreme Court's decision in *Pollard v. Todd*, 148 Mont. 171, 418 P.2d 869 (1966), made it abundantly clear that Section 50-77-101 provided for an absolute statutory duty upon the owners and general contractors to protect workers from the extraordinary hazards associated with scaffolds. *Pollard*, 418 P.2d at 873. As the court in Pollard explained, the pre-1995 statutes precluded the defenses of assumption or risk, contributory negligence, and negligence of a fellow servant. *Pollard* at 873.

Although these defenses were precluded under the Scaffolding Act, negligence in a Scaffolding Act was not automatic, as a defendant who erected appropriate scaffolding, or supervised the erection of appropriate scaffolding, could avoid liability. *Pollard*, 418 at 873. For nearly 30 years, this statute was acceptable. The erection of safe scaffold was a good idea, and the obligation to create a safe scaffold was not seen as overly burdensome. This all changed once the State of Montana was sued in *Steiner*.

Hot on the heels of the December 23, 1994, Montana Supreme Court in *Steiner v. Department of Highways*, the State Legislature took it upon itself to amend Section 50-77-101, MCA. In contrast to Montana's Safety Act, the newly revised Scaffolding Act provides for comparative negligence. Sections 50-70-101 provides as follows:

Scaffolds - Definition - Safety Practices - Liability
"(1) As used in this part, 'scaffold' or 'scaffolding' means a temporarily elevated platform and its supporting structure that is used on a construction site to support a person, material, or both. The term includes a ladder or other equipment that is the exclusive route of access to the scaffold but does not include any other ladder or any other mobile construction equipment.
"(2) Employers and employees shall follow safety practices commonly recognized in the construction industry as well as applicable state and federal occupational safety laws.
"(3) Subject to the comparative negligence principles provided in Title 27, Chapter 1, Part 7, a contractor, subcontractor, or builder who uses or constructs a scaffold on a construction site is liable for damages sustained by any person who uses a scaffold, except a fellow employee or immediate employer, when the damages are caused by the negligence of the contractor, subcontractor, or builder in the use or construction of a scaffold.
"(4) If a person dies from an injury caused by the negligent use or construction of a scaffold, the right of action survives and may be prosecuted and maintained by the decedent's heirs or personal representatives."

Under the above statutory scheme, in particular subsection (3), a contractor is allowed to shift the blame back to the injured worker's employer. Indeed, under the current statutory scheme, the general contractor, who knows nothing about the scaffolding on his or her site, can avoid liability by passing it on to the subcontractor.[2] In other words, the party who is most capable of improving worksite safety can shield him or herself from liability by passing the buck down to subcontractors. This is contrary to any known, effective principle of worksite safety.[3]

Recent District Court Decisions Regarding Non-Delegable Duty

The primary purpose of writing this article is to place MTLA's membership on notice of four very significant district court decisions that

would otherwise be missed when researching Montana Supreme Court decisions. In addition, the combination of these four district court decisions create a situation very similar to the legislative environment that followed the Montana Supreme Court decision in *Steiner v. Department of Highways* in 1994. Simply put, contractors and insurance carriers are losing in court and will likely head to the state legislature for a remedy.

The four decisions I wish to discuss include *McGillivray v. Jurassic Resources Development North America, LLC*, decided in Montana's 13th Judicial District Court in January of 2004; *Matlen v. Engineered Structures, Inc.*, decided in Montana's 11th Judicial District in August of 2005; as well as two decisions out of Montana's 18th Judicial District Court, one occurring in *Wild v. Ridgeline Builders*, handed down February 4, 2006, and the other in *Hawkes v. DMC*, handed down on April 8, 2006.

These four district court decisions cemented the application of Section 50-77-101, MCA, Montana's Safety Act. Barring an unforeseen ruling that contradicts these four cases, it appears that courts in Montana have taken the language of Section 50-71-101, MCA seriously. These district court decisions will be briefly discussed in chronological order.

McGillivray v. Jurassic Resources Development North America, LLC

McGillivray (Cause DV-02-690), was decided by the Hon. Susan P. Watters of Montana's 13th Judicial District Court, Yellowstone County and involved a plaintiff who was working on an oil drilling project in Wibaux County, Montana. The plaintiff was approximately 60 feet above the ground working on a mast when the drilling rig blew over. The plaintiff was an employee of Faith Drilling Company (Faith), who had contracted with Jurassic Resources Development North America, LLC (Jurassic). Jurassic, under the contract, was given the right to drill for oil on land that was leased by Shell Oil Company.

In *McGillivray*, Judge Watters was asked to consider all three separate methods for establishing a non-delegable duty. Although Judge Waters determined that there was neither a duty under the contract nor actions on the part of Jurassic which established a non-delegable duty, the inherently dangerous nature of this activity created a duty and required compliance with Section 50-71-101, MCA.

In evaluating whether the drilling operation could be considered as "abnormally dangerous," Judge Waters looked at Section 520 of the Restatement (Second) of Torts, which outlined the six factors to consider in

determining whether a worksite is abnormally dangerous. If an activity is considered "abnormally dangerous," liability is essentially automatic. Although the district court ultimately determined that drilling for oil was not an abnormally dangerous activity, it did grant the plaintiff's motion for summary judgment as to the affirmative defense of comparative negligence. This distinction is important because the Restatement (Second) of Torts, pursuant to Section 520, allows for absolute liability when the criteria set out in Section 520 of the Restatement (Second) of Torts, is met.

The court's holding in *McGillivray* established that the hazards associated with oil drilling were "inherently dangerous," thus establishing a non-delegable duty and preventing the defendant from raising comparative negligence. The court specifically explained: "Because the court determined that drilling oil is an inherently dangerous activity, Jurassic is vicariously liable for the torts of Faith that are associated with Faith's failure to take precautions to reduce the unreasonable risks associated with engaging in the inherently dangerous activity." This case was the beginning of the end for comparative negligence in these cases and has been cited by other district courts since.

Matlen v. Engineered Structures, Inc.

In Montana's 11th Judicial District Court, Judge Katherine R. Curtis granted the plaintiff's motion for summary judgment on the issue of comparative negligence. *Matlen* involved a serious fall that occurred at a Home Depot store in Kalispell. The plaintiff in that case was employed by Weld-tech, who had contracted with Engineered Structures, Inc. (ESI), the general contractor on the project. In *Matlen*, the general contractor, ESI, conceded that it had a non-delegable duty of reasonable care that developed from its contract with the Home Depot. That contract required ESI to take "all reasonable precautions and provide all reasonable protection to protect injury ..." Although the defendant agreed that the contract required ESI to exercise "actual control over the workplace safety conditions," it argued that Section 27-1-703, MCA, required that all parties' negligence be considered in all cases. The defendant explained that, although it was not allowed to argue the plaintiff's direct employer was comparatively negligent, Section 27-1-703, MCA, required the comparative negligence of all parties to be considered in all cases.

The court found it persuasive that ESI's construction superintendent testified that an OSHA violation had occurred, as the hole through which the plaintiff fell was required to be covered. Since it was uncontested that the defendant, ESI, had violated OSHA as the hole was uncovered when the plaintiff fell, ESI was held to be negligent as a matter of law. In its decision, the district court evaluated ESI's argument that amendments to the Montana Scaffolding Act "abrogate the doctrine of absolute liability discussed by the Montana Supreme Court in *Pollard v. Todd* [citation omitted]." ESI argued that evidence of plaintiff's own comparative negligence was admissible as an affirmative because of the 1995 amendments to the Montana Scaffolding Act. As the court explained, the legislative changes to the Montana Scaffolding Act and the failure of the state legislature to amend Section 50-70-101, MCA, Montana's Safety Act, is evidence that comparative negligence is not a defense. In other words, the district court dismissed ESI's argument explaining that the state legislature's failure to amend Section 50-70-101, MCA, actually provided evidence that the state legislature did not intend to amend this specific statute. As with the other district court decisions, the issue of causation remained a question of fact to be determined by the jury.

Wild v. Ridgeline Builders

Wild was decided by the Hon. Holly Brown in Montana's 18th Judicial District Court and involved a personal injury case where the plaintiff, Kelly Wild (Wild), was employed by Fregein Roofing to complete roofing work for the defendant, Ridgeline Builders. In *Wild*, the district court held that comparative negligence was not available as a defense to the defendant.

In a slightly different tact than the defense taken by ESI above, the defendant in *Wild* argued that the court should apply the Montana Supreme Court's decision in *Cain v. Stephenson*, 218 Mont. 101, 706 P.2d 708 (1985), where the Montana Supreme Court remanded the district court verdict and ordered the district court to reduce damages in accordance with the comparative negligence assigned by the jury. *Cain*, 706 P.2d at 132. The district court held that *Cain* was not applicable because it dealt with the application of the Montana Safety Act to subcontractors, and there was no discussion concerning the issue of comparative negligence in the court's decision in *Cain*. Although the district court in *Wild* did not grant summary judgment concerning negligence, it precludes the defendant, Ridgeline, from raising the defense of comparative negligence.

Hawkes v. McDonald Construction, Inc.

In *Hawkes*, the Hon. Mike Salvagni granted summary judgment to the plaintiff as to both negligence and causation. In *Hawkes*, the plaintiff was employed by Empire Lath and Plaster (Empire), and defendant David McDonald Construction (DMC) had hired Empire as a subcontractor to install an acoustic-tile dropped ceiling into a commercial building. While installing the acoustic tile, Hawkes used 44-inch stilts to stand high enough to install the ceil-

ing. While on stilts, the plaintiff landed in an open vent hole in the subfloor, breaking his ribs and injuring his back. The district court held that, although the contract in that case did not specifically reference safety, it did provide for control on the part of the defendant over DMC employees and all subcontractors. From this particular language in the contract as well as conduct on the part of DMC, the district court held that a non-delegable duty had developed, thus making the Montana Safety Act, Section 50-70-101, MCA, applicable.

District Court Judge Salvagni referred to the *Matlen v. EIS* decision authored by Judge Curtis as well as the *Wild* decision authored by Judge Brown in reaching his conclusion concerning comparative negligence. Further, the decision in *Beckman v. Butte-Silver Bow County* was reviewed by Judge Salvagni in reaching the conclusion that DMC had retained control over the plaintiff's work environment and, therefore, owed a duty to the plaintiff.

The issue of breach was addressed by Judge Salvagni in determining that defendant, DMC, had specifically violated Section 50-70-101, MCA, thus precluding the common-law defenses asserted by DMC. Judge Salvagni explained that evidence of causation was clear as DMC failed to comply with its duty to cover holes, and Hawkes would not have received these injuries otherwise. Finally, Judge Salvagni ruled in favor of plaintiff's motion for summary judgment, allowing the trial to proceed exclusively on the issue of damages.

CONCLUSION

These four district court decisions should be understood for what they hold as well as what they do not hold. First, establishing a non-delegable duty and applying Section 50-71-101, MCA, does not create absolute liability.[4] As the Montana Supreme Court has previously explained, the mere fact that a worker in Montana has been injured at a job site does not establish liability. Rather, Section 50-71-101, MCA holds the general contractor who has the most control over the worksite accountable for injuries that occur on that job site. If contractors comply with OSHA rules and regulations, and make safety a priority, they should have nothing to fear.

Section 50-71-101, MCA, in its current form, reflects the understanding that the worker is in the most vulnerable position as he or she is least able to control safety issues on the job site. This principle has been cemented at the district court level with the cases cited above. One of the best explanations of safety I have ever seen is set out by the Hon. Donald Molloy in *Bear Medicine v. U.S.*, 192 F.Supp.2d 1053 (D. Mont. 2002) where he articulates exactly what we, as trial lawyers, are fighting for and why this is important:

Safety is not common sense, it is a sophisticated proposition that requires knowledge, education, guidance, and equipment among other matters in achieving the goal of eliminating or reducing the risk of serious injury or death that is encompassed in the notion of duty as it exists for a fiduciary or for one involved in an inherently dangerous activity.

We cannot forget that we, as trial lawyers, have thousands of people (who do not even realize it) who are counting on us to protect them. We will undoubtedly be attacked by others who claim the status of this legislation is all about trial lawyers making money. However, the future of work site safety in Montana impacts people. Worksite safety can always be improved and the law in Montana must reflect this fact. Section 50-71-101, MCA, impacts the lives of workers in this state and their families.

As we saw with the 1995 amendments to the Scaffolding Act, Montana's Safety Act is vulnerable to being changed through legislation. As seen in *Matlen* and *Wild*, defense counsel are being creative in trying to drag in comparative negligence. Because district courts have been consistent in their approach to these types of cases, it is safe to assume that a legislative attack is likely at some juncture. It is my hope that this article starts some discussion as to how to address this inevitable legislative attack.

Please feel free to contact Al Smith to obtain copies of the text of the four decisions outlined above.

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ENDNOTES

1. Further discussion of Article II, Section 16 and its application concerning §50-70-101-118, MCA is outlined in *Trankel v. State of Montana*, 282 Mont. 348, 938 P. 2d 614 (1997).

2. Under the post-1995 version of §50-77-101, MCA, a general contractor is now awarded the "Sargeant Schultz" defense by simply stating, "I know nussink."

3. Under OSHA's system of fining employer violations, the further a general contractor is up the chain, the greater the fine that can be assessed upon that contractor. The rationale behind this method for fining contractors is based on the principal that contractors up the chain profit from sub-contracting and thus should be responsible for the activities on the site.

4. To review whether the facts in the case you are handling raise to the level of abnormally dangerous activity, please review Section 520 of the Restatement (Second) of Torts. ◆